



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF a complaint by Kevin Bubb-Clarke, amended October 29, 1998, alleging discrimination with respect to membership in a trade union because of handicap by the Amalgamated Transit Union, Local 113;

AND IN THE MATTER OF a complaint by Kevin Bubb-Clarke, amended October 29, 1998, alleging discrimination in employment because of handicap by the Toronto Transit Commission;

AND IN THE MATTER OF Board of Inquiry File No. BI-0394/395-01

B E T W E E N:

Ontario Human Rights Commission

-and-

Kevin Bubb-Clarke

Complainant

-and-

Toronto Transit Commission
and Amalgamated Transit Union, Local 113

Respondents

INTERIM DECISION

Adjudicator: Alvin B. Rosenberg

Date: December 19, 2001

Board File No.: BI-0394/395-01

Decision No.: 01-029-I

APPEARANCES

Ontario Human Rights Commission)	Anthony P. Griffin
)	

Mr. Kevin Bubb-Clarke, <i>Complainant</i>)	on his own behalf
)	

Toronto Transit Commission, <i>Respondent</i>)	Angela E. Rae
)	

Amalgamated Transit Union,)	Susan M. Ursel and
Local 113, <i>Respondent</i>)	Janice Y.S. Chung

The Respondent, Amalgamated Transit Union, Local 113 (the "Union"), seeks an order adding the Toronto Transit Commission (the "TTC") to a complaint by Kevin Bubb-Clarke (the "Complainant"), amended October 29, 1998, alleging discrimination with respect to membership in a trade union because of handicap.

BACKGROUND

The original complaint and the amended complaint were against both the TTC and the Union as one complaint. The Ontario Human Rights Commission (the "Commission") decided to separate the two complaints and, accordingly, had new complaints executed – one against the TTC and one against the Union. When the Commission referred the matter to the Board of Inquiry (the "Board"), they combined the two complaints for the purpose of the hearing. However, in my view and the view of counsel, there still remain two separate complaints to be heard together for the purpose of convenience because many of the issues and facts were the same.

There are a number of other issues, but the major issue is whether or not when the Complainant because of his disability transfers from one department of the TTC to another, he can take his seniority with him. The collective agreement between the Union and the TTC does not provide for the transfer of the seniority from the Transportation Division to the Maintenance Division, which the Complainant transferred to because of his disability.

It appears that the TTC was prepared to allow for the transfer of all seniority and that the Union was not.

On October 16, 2001, the Complainant, the Commission and the TTC entered into what was entitled Minutes of Settlement which included a Release which was attached as Appendix "A". I attach both the Minutes of Settlement and Appendix "A" to this interim decision as Appendix 1.

The Board has the jurisdiction to add the TTC upon such terms as the Board considers proper, if the TTC appears to have infringed the right of a complainant. (Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 as am., ss. 39(2)(d) and (3); *Thornton v. North American Life Assurance Co. (No. 1)* (1992), 16 C.H.R.R. D/162 (Ont.Bd.Inq.): paras. 32-33,38; *Walter Hyman v. Southam Murray Printing and International Brotherhood of Teamsters, Local 419* (1981), 3 C.H.R.R. D/617 (Ont.Bd.Inq.): paras. 5644-5646).

The Board has the authority to add the TTC to the complaint since the TTC has sufficient notice and opportunity and is, therefore, not prejudiced. In this case, the TTC had knowledge of the complaint from the outset. (*Leroux v. Ontario (Human Rights Comm.)* (1999), 35 C.H.R.R. D/338 (Ont.Ct. (Gen.Div.)): paras. 29-33; *Bahjat Tabar and Chong Man Lee v. David Scott and West End Construction Limited* (1982), 3 C.H.R.R. D/1073 (Ont.Bd.Inq.): paras. 9456-9461).

Normally, an employer is a necessary party to proceedings before the Board where there is an allegation that a contract which it has entered into has infringed the right of an employee. It does not matter that the term of the contract is “mandatory”. (*Thornton, supra*, paras. 44,47).

The terms of the collective agreement are being challenged in this case, insofar as they refer to persons with handicaps in the position of the complainant and, normally, both parties to the collective agreement would be responding parties to provide a complete legal scenario. Both parties in this case were respondents, initially, and both parties have a duty to avoid discrimination. (*Thornton, supra*, para. 45; *O.P.E.I.U., Local 267 v. Domtar Inc.* (1990), 12 C.H.R.R. D/161 (Ont.Bd.Inq.) para. 73; *conf'd* (1992), 16 C.H.R.R. D/479 (Ont.Div.Ct.) paras. 22-23). It has been held that an “employer cannot escape responsibility for ensuring a fair employment environment, both in fact and in law”. (*Thornton, supra*, para. 50).

The Union also argues that there are conceivable circumstances where the Union might wish to claim over against the TTC and that, therefore, they require that the TTC be a party. The Union also argues that at the end of the hearing, there may be grounds for an award, jointly and severally, against the Union and the TTC, and this can only be effective if the TTC is a party.

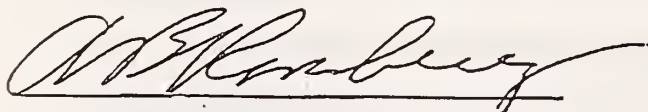
DECISION

The question of joint and several liability does not arise. These proceedings are adversarial and both the TTC and the Commission and Mr. Bubb-Clarke agree that no joint and several remedies or awards will be asked for. Further, the Union has not alleged any facts that would entitle them either to indemnity or contribution from the TTC and these proceedings are some five years old and there has been ample opportunity in the pleadings to make any such allegations.

One factor that distinguishes this case from the *Thornton* case is that, in this case, the TTC, the Commission and the Complainant, object to the TTC being added. In *Thornton*, the complainant did not object to adding the employer. In my view, there is also an important policy consideration. The TTC has settled to the limit of its ability to settle. This type of settlement, approved by the Commission and accepted by Mr. Bubb-Clarke, should be encouraged. If the Union were successful in adding the TTC, the settlement would have little, if any, effect.

While it is conceivable that at the end of the day there could be a decision against the TTC that would be unenforceable because the TTC is not a party, this should not be a concern of the Union. The Commission and the Complainant have agreed that no such claim will be made and so far as the Union is concerned, this does not prejudice them. Accordingly, the motion to add the TTC as a party is dismissed.

Dated at Toronto, this 19th day of December 2001.

A handwritten signature in dark ink, appearing to read 'A. B. Rosenberg', written over a horizontal line.

The Honourable Alvin B. Rosenberg, Q.C.
Member

MINUTES OF SETTLEMENT

This memorandum of settlement entered into this 16th day of OCT., 2001.

BETWEEN:

KEVIN BUBB-CLARKE

(hereinafter referred to as "the Complainant")

- AND -

TORONTO TRANSIT COMMISSION

(hereinafter referred to as "the Corporate Respondent")

- AND -

THE ONTARIO HUMAN RIGHTS COMMISSION

(hereinafter referred to as "the Commission")

WHEREAS the Complainant filed a complaint with the Commission dated April 25, 1996, Complaint No. TC-003151, as amended, alleging discrimination in employment because of handicap;

AND WHEREAS the Commission referred the subject matter of this complaint to the Board of Inquiry;

AND WHEREAS the above parties have agreed to resolve all matters arising between them;

NOW THEREFORE the above parties agree to settle this matter as follows:

1. The Corporate Respondent shall pay to the Complainant the sum of Five Thousand Four Hundred and Seventy-one Dollars (\$5,471.00), representing general damages.
2. The Corporate Respondent agrees to purchase the credited service of the Complainant for the period February 19, 1996 to May 12, 1996, upon the Complainant making that election with the TTC Pension Fund Society. The Corporate Respondent will not be held liable for any taxes or other losses incurred from any past service pension adjustment arising out of the purchase set out in this clause.

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3. The parties agree to execute and file Form 3 and these Minutes of Settlement with the Board of Inquiry and to consent to an order of the Board of Inquiry disposing of the proceedings as against the Corporate Respondent in accordance with the terms of these Minutes of Settlement.
4. The Corporate Respondent does not oppose an Order that the Complainant be credited with seniority for his total years of service, active or otherwise, starting from the date he commenced employment with the Corporate Respondent, for the purpose of bidding for vacancies and job postings, layoffs, and any other right based on seniority under the Collective Agreement and its regulations.
5. The Corporate Respondent does not oppose an Order that in the case of individuals who change divisions as a result of accommodation pursuant to the Ontario *Human Rights Code*, it cease applying the provisions of the Collective Agreement and its regulations that prohibit transferability of seniority from one division of the Corporate Respondent to another
6. The Corporate Respondent does not oppose the issuance of a declaration that the seniority provisions of the Collective Agreement between the Amalgamated Transit Union ("ATU") and the Corporate Respondent that deny transferability of seniority from one division to another violated the Complainant's right to equal treatment without discrimination because of handicap.
7. The Complainant and the Commission hereby agree not to seek any further remedy from the Corporate Respondent related to the Complainant's employment to the date hereof with the Corporate Respondent, and, without limiting the generality of the foregoing, agree not to seek, directly or indirectly, any remedy as against the Corporate Respondent in any continued Board of Inquiry proceedings by the Commission and/or the Complainant as against the Amalgamated Transit Union. The Complainant shall execute a Release to this effect in the form attached hereto as Appendix "A".

IN WITNESS WHEREOF this Agreement has been executed by the parties.

Diana Bubb-Clarke

Witness

Oct 16, 2001

Date

Kevin Bubb-Clarke
KEVIN BUBB-CLARKE

TORONTO TRANSIT COMMISSION

PER _____

Witness

Date

THE ONTARIO HUMAN RIGHTS
COMMISSION

PER CW M

Oct. 17/01

Date

MINUTES OF SETTLEMENT

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- AND -

TORONTO TRANSIT COMMISSION

(hereinafter referred to as "the Corporate Respondent")

- AND -

THE ONTARIO HUMAN RIGHTS COMMISSION

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Witness

KEVIN BUBB-CLARKE

Date

TORONTO TRANSIT COMMISSION

PER

Teressa Sprack Campbell

Melina Cole
Witness

October 16, 2001
Date

THE ONTARIO HUMAN RIGHTS
COMMISSION

PER _____

Date

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APPENDIX "A"

RELEASE

I. KEVIN BUBB-CLARKE, (hereinafter called the "Releasor", which term includes heirs, executors, administrators, successors and assigns) in consideration of the terms and conditions set out in the attached Minutes of Settlement, hereby release and forever discharge TORONTO TRANSIT COMMISSION ("TTC") (hereinafter called the "Releasee" which term includes all present and former officers, directors, agents, employees, servants, insurers, successors and assigns, and all parent, subsidiary, related and affiliated and predecessor agencies, and all their present and former officers, directors, agents, employees, servants, insurers, successors and assigns), of and from all manner of actions, causes of action, claims, demands, or complaints, which the Releasor had, now has or hereinafter may have, against the Releasee, based upon, arising out of, or in any way related to, the Releasor's employment with the Releasee to the date herein, and without limiting the generality of the foregoing, the complaint set out in the Releasor's human rights complaint dated April 25, 1996 (Complaint No. TC-003151, as amended).

THE RELEASOR hereby specifically covenants, represents and warrants to the Releasee that he has no further claim against the Releasee for or arising out of her employment with the Releasee to the date herein including, without limiting the generality of the foregoing, any claims for pay, disability benefits, expenses, commission, bonuses, overtime pay, interest, benefits, and/or vacation pay, and specifically including any claim under the Ontario *Employment Standards Act*, R.S.O. 1990, c. E.14, the Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1 Sch. A, the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, the Ontario *Workplace Safety & Insurance Act*, 1997, S.O. 1997, c. 16, or any other legislation governing or related to the employment of the Releasor. The Releasor also acknowledges that he has been paid all amounts owing to him under the foregoing statutes. In the event that the Releasor should hereafter make any claim or demand or commence or threaten to commence any action, claim or proceeding, or make or continue any complaint against the Releasee or anyone connected with the Releasee for or by reason of any cause, matter or thing arising prior to the date herein, this document may be raised as an estoppel and complete bar to any such claim, demand, action, proceeding or complaint. Further, the

Releasor acknowledges and agrees that, in light of this settlement, any complaint filed or continued under the *Human Rights Code* or *Employment Standards Act*, or any other legislation, which in any way relates to his employment to the date herein would be frivolous, vexatious and an abuse of process. The Releasor agrees that this settlement can be relied upon as a complete bar to any such action or complaint.

THE RELEASOR hereby covenants and agrees to save harmless and indemnify the Releasee from and against all claims, charges, taxes, interest or penalties and demands requiring the Releasee to pay amounts under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 and/or the *Income Tax Act*, R.S.O. 1990, c. L2, for or in respect of income tax payable by the Releasor in excess of amounts previously withheld, and in respect of any and all claims, charges, taxes, interest or penalties and demands which may be made on behalf of or related to the *Employment Insurance Act*, S.C. 1996, c. 23 or the *Canada Pension Plan*, R.S.C. 1985, c. C-8 or under any other applicable statutes and regulations, with respect to any amounts which may, in the future, be found to be payable by the Releasee in respect of the Releasor, and any interest or penalties relating thereto and any costs or expenses incurred in defending such claims and demands.

AND FOR THE CONSIDERATION the Releasor agrees not to make or continue any claim or take or continue any proceeding in connection with any of the claims released by virtue of the preceding paragraphs against any other person or corporation who might claim contribution or indemnity from the Releasee by virtue of the said claim or proceeding.

THE RELEASOR acknowledges and agrees that in the event that any provision or part of this Release is deemed void or invalid by a court of competent jurisdiction, the remaining provisions or parts shall remain in full force and effect.

AND THE RELEASOR HEREBY declares that he fully understands the terms of the settlement, and that the terms thereof constitute the sole consideration for this Release and

Indemnity and that he voluntarily accepts the amount stated therein for the purpose of making full and final compromise, adjustment and settlement of all claims as aforesaid.

THE RELEASOR agrees that he has read this Release and has had the opportunity to obtain independent legal advice with respect thereto and understands that it contains a full and final release of all claims that he has, or may have, against the Releasee relating to his employment to the date herein.

DATED this 16th day of Oct., 2001.

SIGNED in the presence of

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)
)

Kevin Bubb-Clarke

Witness' Signature

Kevin Bubb-Clarke

KEVIN BUBB-CLARKE

Board of Inquiry
(Human Rights Code)

505 University Avenue, Second Floor
Toronto ON M5G 2P3
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Commission d'enquête
(Code des droits de la personne)

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Sans frais: 1-800-668-3946
Téléscripteur: (416) 314-2379
Téléscripteur sans frais: 1-800-424-1168
Télec.: (416) 314-8743



BI-0394/395-01

DATE: December 21, 2001

TO: All Parties Concerned

FROM: Caroline Goodwin, Deputy Registrar
(416)- 314-8419

RE: *Bubb-Clarke v. Toronto Transit Commission and Amalgamated Transit Union Local 113*

SUBJECT: Appendix on Interim Decision Released December 19, 2001

We were unable to reduce the appendices noted in the above Decision to an electronic format, therefore, we are sending a paper copy only.

An electronic copy of the Decision without the appendices is available. Please contact our office should you wish a copy.

